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Attorneys for Defendant BlendJet Inc.

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

BLENDTEC INC., a Utah corporation,

Plaintiff,

vs.

BLENDJET INC., a Delaware corporation,

Defendant.

**DEFENDANT BLENDJET'S SHORT
FORM MOTION TO COMPEL
RESPONSE TO SUBPOENA TO
MARKETSTAR**

Civil No. 2:21-cv-00668-TC-DBP

Judge Tena Campbell
Magistrate Judge Dustin B. Pead

Pursuant to Fed. R. Civ. P. 37(a)(3) and 45(d)(2)(B) and DU CivR 37-1(b), BlendJet Inc. moves to compel the production of documents in response to the subpoena served on MarketStar QOZ Business, LLC. (Exhibit A.)

BlendJet noticed the Subpoena on December 9, 2022. (*See* Exhibit B.) Plaintiff Blendtec, Inc. served objections on December 15, 2022. (*See* Exhibit C.) The Subpoena was served on December 19, 2022. (*See* Exhibit D.) MarketStar served substantively identical objections on January 3, 2023, and thereafter confirmed that Blendtec’s counsel are also representing MarketStar with respect to the Subpoena. (*See* Exhibit E; Exhibit F at 2-3.) To date, MarketStar has stood on its objections and refused to “search for and produce” any responsive documents. (Exhibit F at 1.) On February 7, 2023, BlendJet’s counsel (Messrs. McGill and Salen) conferred telephonically with counsel for both MarketStar and Blendtec (Brett Foster and Tammy Kapaloski). (Exhibit G.)

There is no dispute that MarketStar possesses documentation responsive to the Subpoena. MarketStar “is a sister company of Blendtec, and both MarketStar and Blendtec are owned and controlled by Wasatch Capital.” (Exhibit E at 1.) MarketStar and Blendtec share the same CEO and CFO (Keith Titus and Ben Kaufman) and the same counsel. (Exhibit C at 2; Exhibit E at 1). And Blendtec “agreed to produce emails from Mr. Titus’ and Mr. Kaufman’s MarketStar email accounts”— as part of its custodial ESI production. (Exhibit F at 1.) Presumably MarketStar is providing Blendtec with access to these materials, as Blendtec otherwise contends that it “does not have possession, custody, or control of Marketstar emails or other documents.” (Exhibit F at 3.) But this contention contradicts MarketStar’s objection that “the majority of any non-privileged documents requested in the subpoena are in the possession, custody, or control of Blendtec.” (Exhibit E at 1.) Production of MarketStar documents responsive to the Subpoena is necessary to

ensure materials are not shielded from discovery merely because they are solely in the possession of MarketStar. *See, e.g., Martley v. City of Basehor, Kan.*, Case No. 19-cv-2138-DDC-GEB, 2022 WL 1302820, at *3-4 (D. Kan. May 2, 2022) (subpoena proper “where a party [does not have] control over the requested documents that are in the possession or custody of a non-party”).

MarketStar says Blendtec has possession of responsive documents; Blendtec says it does not. One of these parties should be compelled to produce the responsive documents. If Blendtec does in fact control and produces responsive documentation, BlendJet will narrow the scope of the Requests accordingly. BlendJet is also willing to confer with MarketStar to narrow the scope of the Requests, if appropriate – but MarketStar has refused to engage in that process.

Finally, any objection by Blendtec based on a “personal right or privilege” is resolved by application of the Standard Protective Order. *See* DUCivR 26-2; *High Point SARL v. Sprint Nextel Corp., et al.*, Case No. 09-cv-2269-CM-DJW, 2011 WL 4008009, at *2 (D. Kan. Sept. 9, 2011).

BlendJet requests its attorneys’ fees under FRCP 37(a)(5)(A).

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Respectfully submitted this 17th day of February, 2023.

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/s/ Nathan D. Thomas

Attorneys for Defendant BlendJet, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send an electronic notification to counsel of record for all parties, including the following:

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